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IN THE

SUPREME COURT OF THE UNITED STATES

NO: 82-6263

ROBERT SAWYER, PETITIONER

VERSUS

LOUISIANA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA

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I

THE FACT THAT ONE OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY WAS NOT A STATUTORY AGGRAVATING CIRCUMSTANCE DOES NOT INVALIDATE THE DEATH SENTENCE THAT THE JURY IMPOSED ON ROBERT SAWYER

Louisiana Code of Criminal Procedure Article 905.2 provides that in a case involving a conviction for first degree murder the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender, the hearing shall be conducted according to the rules of evidence, and evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the accused places his character at issue. Further, Article 905.3 of that Code states that a sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists. The various statutory aggravating circumstances are listed in Article 905.4.

In recommending that Robert Sawyer be sentenced to death, the jury in the instant case found the existence of three statutory aggravating circumstances--that when the murder occurred Sawyer was engaged in the perpetration of aggravated arson; that the offense was committed in an especially heinous, atrocious, and cruel manner; and that Sawyer was previously convicted of an unrelated murder. See Louisiana Code of Criminal Procedure Article 905.4 (a), (c) and (g).

On Sawyer's appeal the Louisiana Supreme Court held that the third statutory aggravating circumstance found by the jury--that Sawyer was previously convicted of an unrelated murder--was not supported by the evidence because although Sawyer had been indicted for second degree murder he had pleaded guilty to involuntary manslaughter, but that this fact did not invalidate the death penalty. See State v. Sawyer, 422 So.2d 95, 101 (La. 1982). In reaching this conclusion the Louisiana Supreme Court reasoned thus: (422 So. 2d, at 101-102) (footnotes omitted)

> "...C.Cr.P. Art. 905.3 only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death.
>
> "This court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death sentence was not otherwise excessive). State v. Martin, 376 So.2d 300 (La. 1979), cert. denied, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297; State v. Monroe, above. The adequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly exposed to the possibility of the death sentence. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc).
>
> "Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of at least one statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the

death penalty should be imposed, considering both the particular crime and the particular offender. If the jury recommends the death penalty, this court must review each of the two separate jury findings.

"Here, the supported finding of the commission of aggravated arson fulfilled the requirement of C.Cr.P. Art 905.3 and the review requirement of Supreme Court Rule 28, § 1(b) regarding a supported finding of the existence of at least one aggravating circumstance. The effect of a determination by this court that the evidence did not support the finding of an additional aggravating circumstance is a question which is more pertinent to the review of the jury's second finding--that is, the finding regarding the appropriateness of the death penalty for this particular crime and this particular murderer." (Emphasis in original)

Compare Zant v. Stephens, 297 S.E.2d 1 (Ga. 1982), in which the Georgia Supreme Court explained why the jury's finding of an additional, unconstitutional, statutory aggravating circumstance did not invalidate Stephens' death sentence: see also Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856 (1982), presently pending in this Court under docket No. 81-89.

In his Petition to this Court for Certiorari Sawyer maintains that the Louisiana Supreme Court has failed in first degree murder cases in which the death sentence has been imposed to conduct a meaningful appellate review of the factors the jury relied upon in imposing the sentence of death, and that, more particularly, in the instant proceeding the Louisiana Supreme Court allowed the jury which sentenced Sawyer "to base their recommedation of death on an arbitrary finding of aggravating circumstance that is not supported by the evidence"--that is, that Sawyer had a prior conviction for an unrelated murder. P. 7.

The State of Louisiana respectfully submits that both of these conclusions are superficial and unsubstantial.

That the Louisiana Supreme Court conducts a painstaking and exceedingly thorough appellate review of all death sentences which have been imposed under

Louisiana's Gregg-like bifurcated first degree murder statute is strikingly obvious from the number of death sentences which have been reversed by the Louisiana Supreme Court since 1976, when the law was enacted. See, for example, the following cases in which the conviction of first degree murder was affirmed, but the death sentence was reversed, and the matter was remanded for a new sentencing hearing: State v. English, 367 So.2d 815 (La. 1979); State v. Collins, 370 So.2d 533 (La. 1979); State v. Sonnier, 380 So.2d 1 (La. 1980); State v. Culberth, 390 So.2d 847 (La. 1980); State v. Lindsey, 404 So.2d 466 (La. 1981); State v. Willie, 410 So.2d 1019 (La. 1982); State v. Brown, 414 So.2d 689 (La. 1982); State v. Jordan, 420 So.2d 420 (La. 1982); State v. Robinson, 421 So.2d 299 (La. 1982); State v. Watson, 423 So.2d 1130 (La. 1982); State v. David, No. 82-KA-0150 on the La. Sup. Ct. docket; State v. Brogden, No. 82-KA-0925 on the La. Sup. Ct. docket; see also State v. Smith, 400 So. 2d 587 (La. 1981), in which the Louisiana Supreme Court affirmed the conviction of first degree murder but remanded the matter to the trial judge for additional testimony relevant to the statutory aggravating circumstances found by the jury.*

Further, petitioner's contention that the jury which sentenced Sawyer was permitted by the Louisiana Supreme Court to "base their recommendation of death on an arbitrary finding of aggravating circumstance that is not supported by the evidence" is similarly without merit. While Sawyer's guilty plea to involuntary manslaughter following an indictment for second degree murder did not technically qualify as a statutory aggravating circumstance under Louisiana Code of Criminal Procedure Article 905.4 (c), which refers to a prior conviction for an unrelated murder, evidence concerning this prior killing by Sawyer was clearly admissible at his sentencing hearing as an aggravating circumstance relating to Sawyer's character and propensities under Article 905.2 of that Code, which provides, pertinently that

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* In effect, the Louisiana Supreme Court has affirmed approximately thirty-one convictions of first degree murder in which the death penalty was imposed in the trial court, but in almost one-half of these cases--the thirteen set out above--the Court has set aside the death penalty for one reason or another.

"The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender.... Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue...."

In this connection, this Court's opinion in Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), is relevant. In Eddings this Court set aside a sentence of death because the trial judge refused to permit the accused to put on evidence of his unhappy childhood and emotional disturbance, pointing out that the sentencer should be permitted to focus on the characteristics of the person who committed the crime.

Therefore the State of Louisiana is of the respectful belief that the fact that one of the three aggravating circumstances found by the jury was not a statutory aggravating circumstance should not invalidate the death sentence that the jury imposed on Sawyer.

II

INTRODUCTION OF EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE IN THE PENALTY PHASE HEARING DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS IF THE EVIDENCE IS PROPERLY AUTHENTICATED AND IS NOT HEARSAY

The Louisiana Supreme Court's decision in this proceeding reads pertinently as follows: (422 So.2d, at 102-104) (footnotes omitted)

"The evidence offered in support of the unproved aggravating circumstance in this case consisted of the official records of the Arkansas circuit court and prison pertaining to defendant's conviction of involuntary manslaughter. Defendant objected to this evidence on the basis (1) that the documents were hearsay and were not properly authenticated and (2) that evidence of the indictment for second degree murder was inadmissible because only evidence of the conviction was admissible.

"A review of the record reflects that the documents were properly certified and were also authenticated by the testimony of the deputy prosecuting attorney. They were identified as properly certified copies of original

documents, which were official records of the circuit court and of the Arkansas State Prison. We therefore conclude that admission of the records was not barred by the lack of authenticity or by hearsay rules.

"Defendant's second ground for objection raises the question of what evidence is admissible in the penalty phase of the trial. C.Cr.P. Art. 905.2 declares that the hearing shall focus on the circumstances of the offense and propensities of the offender, but does not provide any specific rules regarding the admissibility of evidence at this unique type hearing. At a sentencing hearing in a noncapital case (in which the judge will determine the sentence), many of the usual rules of evidence do not apply, because the postconviction focus on the appropriateness of sentence is vastly different from the preconviction focus on guilt or innocence. See Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), which was cited in Gregg for the proposition that in 'the determination of sentences, justice generally requires... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' 428 U.S. at 189, 96 S.Ct. 15 2932.

"The instant case presents the question of whether evidence of a prior unrelated conviction of involuntary manslaughter (which clearly is relevant to a focus on the character and propensities of the offender) is admissible in the prosecution's case in chief, before the defendant takes the stand or otherwise puts his character at issue. In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court, although not specifically addressing the issue, approved a capital sentencing procedure in which any relevant evidence may be introduced in the penalty phase after the offender has been found guilty under a statute (similar to Louisiana's present

statute) which defines first degree murder to require the finding of an enumerated aggravating circumstance as an essential element of the offense. The Court did not discuss the scope of evidence admissible in the penalty phase, but relevance obviously cannot be the sole criteria for determining admissibility. It is logical that the offered proof should also conform to the other applicable rules of evidence and that procedural safeguards for fairness (such as notice) must be considered in determining admissibility.

"We will not attempt in this decision to lay down detailed rules for admissibility of evidence in the penalty phase, but will address the issue only insofar as it is necessary to decide this case.

"We hold that the evidence of the prior unrelated conviction of involuntary manslaughter was properly admitted, although the conviction did not qualify as an unrelated murder under C.Cr.P. Art. 905.4 (c) and although defendant did not take any steps to place his character at issue. In the penalty phase of a capital case, the defendant's character is at issue and indeed is one of the principal issues. In this particular case, the evidence of the prior conviction not only was extremely relevant, but also was competent and highly reliable. Moreover, defendant was apparently prepared to meet the evidence and in fact did so with testimony rebutting or explaining the offical record's factual statement which served as the basis for acceptance of the plea. We therefore conclude that the evidence of the conviction was properly admitted and did not constitute an arbitrary factor which improperly influenced the jury's sentencing discretion.

"As to the evidence of an initial indictment for second degree murder (in the same incident), there was extensive testimony from both defendant and his sister concerning defendant's version of the incident. Even if

the fact of an indictment for a greater offense (than the one to which defendant eventually pleaded) should have been excluded, the gravamen of the evidence was a presentation of the facts of the occurrence, and admission of the indictment was certainly not reversible error."

Petitioner's reliance under this heading on Barclay v. Florida, cert. granted, ___U.S___, 103 S.Ct. 340 (1982), is unfounded. In Barclay the sentencer, the trial judge, relied on a pre-sentence investigation report in imposing the death sentence, rather than certified official documents and firsthand testimony such as we have in the instant case. Otherwise put, the issue in Barclay appears to be not the inherent admissibility of character evidence, but rather the authenticity and reliability of the evidence which was actually offered there. See Barclay v. State, 411 So.2d 1310 (Fla. 1982); Barclay v. State, 362 So.2d 657) (Fla. 1978).

Consequently the State of Louisiana submits that the introduction of evidence of the prior homicide by Sawyer was admissible as an aggravating circumstance to be considered by the jury at the sentencing hearing, and that the evidence of this prior killing was established by authenticated official documents and by the testimony of witnesses, thus making the instant case clearly distinguishable from Barclay v. Florida, supra.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny the Petition for Certiorari sought by Robert Sawyer.

Respectfully Submitted,

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CERTIFICATE

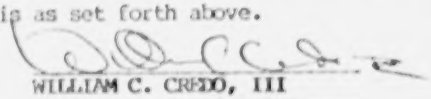
I, **William C. Credo, III,** a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 22nd day March, 1983, I served two copies of the brief in opposition on each of the parties thereto, as follows:

1. On petitioner, **Robert Sawyer** through his counsel of record,

Catherine Hancock and Elizabeth Cole, 7031 Feret Street

New Orleans, Louisiana 70118.

IT IS FURTHER certified that all paties required to be served have been served, and that the list of such parties is as set forth above.



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